

No. _____ 05-504 OCT 17 2005

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In The
Supreme Court of the United States

FRED WARD,

Petitioner,

v.

NATIONAL GEOGRAPHIC
ENTERPRISES, INC., ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to the Eleventh Circuit, that a database containing hundreds of thousands of freelance copyrighted contributions published in thousands of collective works, together with interactive elements, multimedia sequences and advertisements with music and sound, was a permissible revision of every included collective work under Section 201(c) of the Copyright Act.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner is Fred Ward ("Mr. Ward") who was a plaintiff/appellant below. The appellees below and respondents here are the National Geographic Society, National Geographic Enterprises, Inc. (now incorporated under the name NGHT, Inc.), Mindscape, Inc., and Dataware Technologies, Inc.

There are a number of additional respondents aligned with petitioner who were plaintiffs/appellants below. They are Douglas Faulkner, Louis Psihoyos, Matrix International, Inc., as agent for Roger Hutchings, Sarah Leen and Rick Rickman, Sally Faulkner, David Hiser, David G. Allen, as successor and interest to Arthur Allen, Richard Conniff, Jon Krakauer, John Knoebber, Elizabeth Royte, Joe Baraban, Pamela Wilson Sartorelli, Doranne Jacobson, Jerome Jacobson and David Robert Austin (collectively "Additional Respondents").

There are other appellees below and respondents here who petitioner did not name as defendants in the litigation he commenced in the district court. Instead, the Additional Respondents named them as defendants in related litigations they commenced. These other appellees below and respondents here are National Geographic Interactive, Eastman Kodak Co., and National Geographic Holdings, Inc., doing business as National Geographic Interactive, doing business as National Geographic Enterprises, Inc.

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INTRODUCTION

The case is about the preservation of freelancers' copyrights in their contributions to collective works and the dissemination of knowledge and information in the digital age.

Respondent the National Geographic Society ("NGS") created a CD-ROM product called "*The Complete National Geographic*" (the "CNG") that digitally reproduces more than a century of monthly issues of *National Geographic Magazine* (the "Magazine"). The CNG has been so successful that NGS developed approximately 120 versions. The CNG contains thousands of freelance copyrighted contributions to the Magazine. NGS included them without permission or payment, claiming that the CNG is no more than a "historical archive" of Magazine issues. NGS marketed the CNG by encouraging its millions of users to "print" these copyrighted works. A CNG distributor also fostered infringement by encouraging consumers to "use, modify and publish" these works.

Not surprisingly, the Eleventh Circuit in *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir.), cert. denied, 534 U.S. 951 (2001), found the CNG an infringing product and, on remand to the district court, a jury assessed the maximum amount of statutory damages against NGS for its willful infringement, a verdict the district court recently chose not to set aside.

But, the Second Circuit in this case refused to follow *Greenberg*, stating that *New York Times v. Tasini*, 533 U.S. 483 (2001), dictated a contrary result. The circuit court erroneously determined without explanation that the CNG's more than 100 versions somehow satisfied *Tasini's* definition of revision as "one work." Further, the circuit

court approved the addition of multimedia sequences and third-party advertisements to the CNG that *Tasini* prohibits. Moreover, the Second Circuit read *Tasini* as endorsing any digital database, regardless of the number of collective works it aggregates or the electronic elements added to it, so long as the database reproduces the underlying free-lance contributions in the same context as when originally published. *Tasini* manifestly does not mandate this result and copyright law cannot withstand it.

In addition, the decision below sheltered the CNG even though it stores and permits retrieval of the photographs on each page separately and thus, as in *Tasini*, “effectively overrides the Authors’ exclusive right to control the individual reproduction and distribution of each article.” 533 U.S. at 503-504.

This Court’s review is urgently needed to resolve the conflict between the Second and Eleventh Circuits; correct the Second Circuit’s misperception and misapplication of *Tasini*; and give needed guidance to the nation’s copyright industry concerning the scope and extent of the revision privilege under § 201(c) of the Copyright Act. Unless NGS is held accountable for the engine of infringement it has created, copyright will soon mean nothing in the digital world and the incentives on which our copyright system rests will be severely diminished.

OPINIONS BELOW

The Second Circuit’s opinion is reported at *Faulkner, et al. v. National Geographic Enterprises, Inc., et al.*, 409 F.3d 26 (2nd Cir. 2005) (per Winter, J., joined by Raggi and Katzmman, JJ.) and reprinted in the Appendix (“App.”) at

1a-31a. The unreported order denying the petition for rehearing *en banc* is reprinted at App. 86a-87a. The district court's opinion (per Kaplan, D.J.) in *Ward v. The National Geographic Society, et al.*, affirmed by the circuit court, is reported at 294 F.Supp.2d 523 (S.D.N.Y. 2003) and is reprinted at App. 32a-85a. The district court's initial opinion in *Ward v. The National Geographic Society*, relating to issues not relevant to this petition, is reported at 208 F.Supp.2d 429 (S.D.N.Y. 2002).

JURISDICTION

The Court of Appeals entered judgment on March 4, 2005 and denied rehearing on July 21, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY FRAMEWORK

Section 201(c) of the Copyright Act provides:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of [1] that particular collective work, [2] any revision of that collective work, and [3] any later collective work in the same series.

STATEMENT OF THE CASE

A. Parties

The Magazine published over a 28-year period hundreds of Mr. Ward's photographs and texts. Mr. Ward orally licensed to NGS most of his photographs and texts he created in the 1960's and early 1970's. *Ward v. National Geographic, supra*, 208 F.Supp.2d at 434, n. 17. These agreements, pursuant to the custom in the industry, gave NGS the right to use these works one-time in the Magazine. *Id.* at 438. In the late 1970's and 1980's, Mr. Ward entered into formal agreements with NGS that gave it all rights to certain of his photographs and texts but required NGS to make further payment to him if it used those works again after their publication in the Magazine. JA 1452-53, 1460-61.¹ NGS also transferred back to Mr. Ward his copyright to five of his other articles published in the Magazine. App. 26a, JA 1450, 1458, 1472, 1473, 1477.

NGS is a nonprofit organization. In recent years it has engaged through its subsidiaries in commercial exploitation of copyrights belonging to Mr. Ward and hundreds of other freelancers by creating a host of new profit-making consumer products, including the CNG. App. 7a. National Geographic Enterprises, Inc. authorized the CNG's initial distributor, Mindscape, Inc. ("Mindscape") to manufacture, market and distribute the CNG. *Id.*

¹ All citations to record evidence are to the joint appendix ("JA") that was before the Second Circuit.